

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:NER: [REDACTED]: [REDACTED]: TL-N-2540-00  
[REDACTED]

date: APR 21 2000

to: Chief, Examination Division, [REDACTED] District  
Attn: [REDACTED]

from: District Counsel, [REDACTED]

ject: Large Case Advisory Opinion - [REDACTED]

THIS DOCUMENT INCLUDES CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE SERVICE, INCLUDING THE SUBJECT TAXPAYER. THIS DOCUMENT ALSO CONTAINS TAX RETURN INFORMATION SUBJECT TO THE PROVISIONS OF I.R.C. § 6103 AND ITS USE WITHIN THE SERVICE SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW IT.

We are responding to your April 13, 2000 verbal request for assistance. During a meeting on that date, [REDACTED] asked whether it was possible to deny the taxpayer's three recently-filed refund claims and extend the two-year limitations period for commencing a refund suit occasioned by the claim disallowances. As explained below, the limitations period for commencing a refund suit under I.R.C. § 6532(a)(1)<sup>1/</sup> may be extended by the parties using Form 907, Agreement to Extend the Time to Bring Suit. Although you believe that the taxpayer would agree to forego commencing suit until the basis for each claim becomes ripe, there is no guarantee that the taxpayer will not bring suit immediately upon the Service's issuing the claim disallowances.

Issue

Whether the taxpayer, which filed a consolidated return for each year at issue, and the Service may agree to extend the two-year limitations period under section 6532(a) for commencing a refund suit brought under section 7422(a). U.I.L. No. 6532.02-04.

Facts

Recently, the taxpayer, which filed consolidated returns for the taxable years [REDACTED] through [REDACTED], [REDACTED], and [REDACTED], filed protective claims for refund for those years. The returns do not

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<sup>1/</sup> All statutory section references are to the Internal Revenue Code in effect at the time the claims were filed.

specify a specific refund amount, but are protective claims based on specified future events. According to the examination team, the issues cannot be examined at the present time because the claims are all contingent upon the occurrence of the specified events. For example, the taxpayer's entitlement to the [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] claims based upon an additional foreign tax credit depends upon the outcome of the taxpayer's appeal filed in the [REDACTED] courts. The other issues, involving a Foreign Sales Corporation and a basis adjustment of one of the taxpayer's subsidiaries, similarly depends upon the manner in which those matters are resolved by Appeals, Counsel, and/or the Tax Court in subsequent years.

Because the claims are contingent on future events, the examination team does not want to hold the claims open until those events occur. Examination is, therefore, considering various procedural alternatives, including (1) simultaneously disallowing the claims and entering into an agreement to extend the two-year suit period prescribed in section 6532(a), or (2) requesting that the taxpayer simultaneously withdraw the claims and execute an agreement to extend the limitations period to provide for subsequent timely claims. Examination prefers the former alternative. The statute of limitations on assessment has already expired for each year in question.

#### Discussion

The concept of a protective claim is well established in the case law even though the term is not used in the statute or regulations. Protective claims are filed to preserve the taxpayer's right to claim a refund when the taxpayer's right to the refund is contingent on future events and may not be determinable until after the statute of limitations expires. The Internal Revenue Manual (IRM) indicates that a protective claim is generally based on an expected change in the law, other legislation, regulations, or case law. See I.R.M. 21.5.9.3.7.4.

A valid protective claim need not state a particular dollar amount or demand an immediate refund. However, the claim must (1) identify and describe the contingencies affecting the claim; (2) be sufficiently clear and definite to alert the Service as to the essential nature of the claim; and (3) identify a specific year or years for which a refund is sought.

The Service has discretion in deciding how to process protective claims. In general, it is in the Service's interest to delay action on protective claims until the pending litigation or other contingency is resolved. Once the contingency is resolved, the Service may obtain additional information necessary in processing the claim and then allow or disallow the claim.

In this case, the claims filed by the taxpayer are protective in nature because the taxpayer's right to a refund is contingent upon certain future events described in the claims. Because the validity of the claims will not be determinable until after the statute of limitations expires for the years in question, the Service and the taxpayer would prefer that the Service deny the claims, rather than hold them open indefinitely. Additionally, because the future events may not occur until well into the future, the parties also wish to extend the time within which the taxpayer must file suit following the claim disallowances.

Section 7422(a) provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax until a claim for refund has been duly filed. Under section 6532(a), no suit or proceeding under section 7422(a) shall be begun until the earlier of (1) the expiration of six months from the date of the filing of the claim for refund, or (2) a decision is rendered on such claim before the six-month period expires.

Section 6532(a)(1) provides generally that a refund suit may not be commenced after the expiration of two years from the date the Service mails to the taxpayer, by either certified or registered mail, a notice of disallowance of the part of the claim to which the suit or proceeding relates. The two-year period may, however, be extended for a period agreed upon in writing between the taxpayer and a district director, a director or an internal revenue service center, or an assistant regional commissioner. Section 6532(a)(2); Treas. Reg. § 301.6532-1(b). The agreement must be signed by the Service before the two-year suit period provided in section 6532(a)(1) expires. Rev. Rul 71-57, 1971 C.B. 405.

Form 907 is used to extend the two-year period under section 6532(a)(1). Form 907 itself states that it may be signed by the taxpayer's attorney or agent, provided such action is specifically authorized by the power of attorney (Form 4868) which, if not previously filed, must accompany Form 907. Rev. Rul. 76-60, 1976-1 C.B. 387. A signed Form 2848 is insufficient to authorize a taxpayer's representative to sign the Form 907 in the absence of language containing specific authorization. Id.

For the foregoing reasons, the Service may disallow the taxpayer's claims and extend the two-year limitations period under section 6532(a)(2) using Form 907. Although you believe that the taxpayer would agree to forego commencing suit until the basis for each claim becomes ripe, there is no guarantee that the taxpayer will not bring suit immediately upon the Service's issuing the claim disallowances.

We are simultaneously submitting this memorandum to the National Office for post-review and any guidance they may deem appropriate. Consequently, you should not take any action based on the advice contained herein during the 10-day review period. We will inform you of any modification or suggestions, and, if necessary, we will send you a supplemental memorandum incorporating any such recommendation.

Since there is no further action required by this office, we are closing our file in this matter. Please call [REDACTED] at [REDACTED] if you have any questions or require further assistance.

[REDACTED]  
Acting District Counsel

By: \_\_\_\_\_

[REDACTED]  
Attorney